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Nos. 78-1545 and 80-951 (Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANNE B. ZIPES, et al.,

Petitioners,

vs. No. 78-1545

TRANS WORLD AIRLINES, INC.

Respondent.

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Petitioner,

vs. No. 80-951

TRANS WORLD AIRLINES, INC., and ANNE B. ZIPES, et al.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF

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MOTION OF TRANS WORLD AIRLINES, INC., RESPONDENT, FOR LEAVE TO FILE SUPPLEMENTAL BRIEF ON INTERVENING MATTERS AFTER ARGUMENT

Trans World Airlines, Inc.,* respondent, moves this Court for leave to file the attached Supplemental Brief in order to differentiate the facts in this case, argued December 2, 1981,

* As required by Rule 28.1 of this Court, Trans World Airlines, Inc. states that it is a subsidiary of Trans World Corporation, of which Hilton International Co., Canteen Corporation, Spartan-Newfoods Corp., and Century 21 Real Estate Corporation are also subsidiaries.

from those in two later cases. In this TWA case under Title VII of the Civil Rights Act of 1964, major issues discussed in the briefs and oral argument included (1) the subject matter jurisdiction of the district court to approve a settlement of the litigation and grant seniority to reinstated employees and (2) an intervening union's due process right to require proof of a violation of Title VII as a basis for the settlement.

One case to be differentiated is *United States* v. *City of Miami*, ____ F. 2d ____ (5th Cir.), decided December 3, 1981. It is the subject of a motion by the intervening union petitioner in this TWA case for leave to file a supplemental brief in this Court.** A copy of the Fifth Circuit's slip opinion is printed with the union's motion. The court of appeals reversed a consent decree in a Title VII case and remanded it to the trial court to give a current employee's union an opportunity to contend that discrimination had not been proved and to attack a promotion provision of the decree (slip opinion, p. 13733). The superficial resemblance of the decision to issues in this TWA case justifies a supplemental brief by TWA whether or not the union's motion is granted.

The other case to be differentiated involves the antitrust settlement in *United States* v. *American Telephone and Telegraph Company*, which has been much publicized after it was filed January 8, 1982. See recent accounts in *New York Times* and *Wall Street Journal*, cited in the attached brief. In that case, an antitrust action under the Clayton Act, the parties attempted to settle the litigation without compliance with an amendment to the Clayton Act requiring a consent judgment in a Government antitrust case to be preceded by public notice, participation in hearings by interested persons, finding of public interest supporting the judgment, etc. 15 U. S. C. A. 16, 1981 Pocket Part, pp. 183-6.

** TWA was served on January 25, 1982 with a response of plaintiff class to the Union's motion.

It is important that the settlement in this TWA case not be adversely affected by the *Miami* and *AT&T* cases. Further, the issues in this TWA case are more sharply defined by a comparison with the procedural problems in those cases.

TWA therefore seeks leave to file the Supplemental Brief accompanying this motion in accordance with Rule 35.5 of this Court for presentation of "intervening matters . . . not available in time to have been included in the brief in chief."

Respectfully submitted,

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SUPPLEMENTAL BRIEF OF TRANS WORLD AIRLINES, INC., RESPONDENT

The issues discussed in this brief, which are confined to two main contentions of the petitioner-union in No. 80-951, are set forth in the briefs filed previous to the oral argument on December 2, 1981. Those contentions are (1) that the district court lacked subject matter jurisdiction to approve the settle-

ment and award retroactive seniority and (2) that the union was deprived of due process of law. Recent developments, involving similar issues in *United States* v. *City of Miami*, ____ F. 2d ____ (5th Cir.), decided December 3, 1981, and in *United States* v. *American Telephone and Telegraph Company*, pending in the District of Columbia, justify this Supplemental Brief after oral argument.

In the *Miami* case, the Government and the City of Miami entered into a consent decree with many provisions about the city's employment practices which had been claimed to be discriminatory in an action under Title VII of the Civil Rights Act of 1964. The decree, vacated on the motion of the union representing current police officers, was later re-entered over the union's objection. So far as appears from the four opinions in the court of appeals, there never was a hearing of evidence on the union's contentions, although there were legal arguments. On the union's appeal, the decree was reversed with an unusual alignment of positions in the four opinions. On remand the district court was directed to give the union the opportunity either to contend that discrimination had not been proved or that the relief involving promotions (apparently the union's only objection) was not justified (slip opinion, p. 13733, appendix to union motion in this TWA case for leave to file Supplemental Brief).

The facts about the much publicized settlement in the *AT&T* case are derived from newspaper accounts of statements by district judges and counsel for the parties. The precise procedural details may not be complete, but the main facts appear to be clear. An antitrust consent decree between the Government and AT&T was entered in the New Jersey District Court in 1956. In a later Government antitrust case against AT&T in the District Court of the District of Columbia, AT&T and the Government entered into a settlement after years of litigation and months of trial before Judge Harold H. Greene. The settlement document was filed in the New Jersey District Court and publicly announced on January 8, 1982, *New York*

Times, midwest edition, January 9, 1982, pp. 1, 25. The Government and AT&T had not complied with the requirements of the 1974 amendment of § 5a of the Clayton Act for submitting a consent judgment to the District Court after public notice, the filing of "competitive impact statement," hearings, etc. (15 U. S. C. A. 16, 1981 Pocket Part, pp. 183-6). On January 11, 1982 in the District Court in New Jersey, the Government and AT&T sought an amendment to the 1956 decree that would incorporate the settlement terms and moved to transfer the amended consent decree to the District Court in the District of Columbia. *New York Times*, January 13, 1982, pp. 1, 30. The parties intended to dismiss the District of Columbia case so that "It doesn't exist anymore." *New York Times*, January 15, 1982, p. 40.

But Judge Greene on January 12, 1982, refused to dismiss without scrutiny of the agreement, saying he believed the 1974 amendment to § 5a of the Clayton Act to be applicable. *New York Times*, January 13, 1982, pp. 1, 30. He noted that competitors of AT&T, such as North American Telephone Association and the MCI Communications Corporation, wished to express opinions on the settlement. Commenting that there would "always be a cloud" over the settlement without judicial review under the 1974 statute, Judge Greene concluded that he would resume the trial unless the parties resolved the procedural problems. *Wall Street Journal*, January 13, 1982, p. 2. On January 21, 1982 Judge Greene issued an order requiring newspaper publication of a summary of the settlement, a competitive impact statement, and other material. *New York Times*, January 22, 1982, p. 27.

ARGUMENT

The procedural problems in the *City of Miami* and *AT&T* litigations and in this TWA case may appear to be similar. But the differences are more important than the similarities, and the issues in the TWA case are simpler and narrower. This brief shows there is no need for concern that a decision on the settlement here will have an effect as a precedent on the *Miami* or *AT&T* settlement. Further, the rulings on these settlements will not affect TWA's basic position *that the settlement approval order should be affirmed regardless of the decision on the subsidiary seniority order,* which is the only matter adversely affecting the union-petitioner (TWA's chief brief, p. 13).

I

THE PUBLIC POLICY FAVORING SETTLEMENTS, APPLIED IN THE *MIAMI* CASE AND NOT EFFECTIVE IN THE *AT&T* CASE, REFUTES THE UNION'S ATTACK ON THE DISTRICT COURT'S JURISDICTION TO APPROVE THE TWA SETTLEMENT

In the *Miami* case, which was not a class action, it apparently was not necessary for the parties to obtain court approval of the settlement under Rule 23(e) of the Federal Rules of Civil Procedure. But, since the settlement took the form of a consent decree, the district court necessarily had to be satisfied with its provisions. The opinion of five judges, which contained the mandate adopted by eleven other judges (slip opinion, pp. 13733, 13739), discussed the strong judicial policy in favor of settlements (pp. 13723-7), concluding that the decree was proper to the extent third parties were not affected.

In the *AT&T* case, Judge Greene indicated the settlement was ineffective, possibly void, because the parties failed to comply with the Clayton Act's new 1974 prerequisites for consent judgments in Government antitrust cases. Federal

courts had entered antitrust consent decrees for decades under the elementary implied power of equity courts to approve settlements. The 1974 Clayton Act amendment regulated the implied power. In ignoring the 1974 statute, the parties in the *AT&T* case could not argue that the court's implied power supported their arrangement.

In contrast, in this TWA case, the settling parties complied with the court approval requirement of Rule 23(e) of the Federal Rules of Civil Procedure for the settlement or dismissal of class actions. The court's implied power concerning settlements was especially strong because in Title VII cases the policy favoring settlements is not only judicial in origin but Congressional. *Carson* v. *American Brands, Inc.*, 450 U. S. 79, 88 (1981), noting that Congress encouraged the settlement of Title VII cases. This strong policy has two basic results in this TWA case.

First and most important,* the judicial power and policy favoring settlements refute the jurisdictional contention of the union. It contends subject matter jurisdiction to approve the settlement is lacking because of the court of appeals decision, still under review in this court, that a large majority of the plaintiff class members failed to comply with the jurisdictional time limit of Title VII. The union cites many court decisions for the traditional strict results of lack of subject matter jurisdiction. But what controls here is the policy favoring settlements. Both policies, of subject matter jurisdiction and settlement, have *the same objective of reducing the burden of litigation on the courts and the parties.* The policies do not conflict here. The court's

* There is a shorter answer to the union's attack on the subject matter jurisdiction of the district court. Under the settlement and this court's usual practice, the court of appeals' decision on lack of subject matter jurisdiction (under review in No. 78-1545) would be vacated as moot and the action would be dismissed. *Preiser* v. *Newkirk*, 422 U. S. 395, 403–4 (1975). See TWA's chief brief, p. 6, first and second alternatives. p. 13 n6.

authority to approve a settlement and, as an implied or ancillary matter, to award retroactive seniority, is not diminished by the possibility that subject matter jurisdiction might have been held lacking on ultimate review.

Second, the union's major contention that the district court could not be authorized to determine retroactive seniority is answered by the court's implied or ancillary power to approve a settlement, particularly since the district court in a Title VII case has the broad authority of a court of equity.* That power includes what is appropriate to conclude the litigation. The implication accords with an age-old maxim of equity, "Equity delights to do justice, and not by halves." 30 C. J. S. § 67 (p. 919) and §104 (p. 1069). The employer and terminated employees are unlikely to be able to settle the amount of seniority without objection by current employees or their union. It is appropriate for the disputed amount of seniority to be decided by the court in order to wind up the litigation. See this Court's 1977 *Teamsters* opinion and court of appeals decisions so indicating. TWA's chief brief, pp. 15-16.

Regardless of the implications of these recent *Miami* and *AT&T* cases, this *TWA* case thus calls for full application of the judicial and Congressional policies favoring settlement of litigation. Those policies overcome the strict jurisdictional principles urged by the union to overturn the settlement.

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* Congress has so indicated. § 1343(4) of Judicial Code, 28 U. S. C. 1343(4); § 706(g) of Title VII, 42 U. S. C. § 2000e. The courts have so indicated in denying the right to a jury trial in Title VII cases because Title VII authorizes only equitable relief. *Grand American S & L Asso.* v. *Novotny*, 442 U. S. 366, 375 n19 (1979). In authorizing an equity court to enforce a regulatory statute, Congress was "cognizant of the historic power of equity to provide complete relief." *Mitchell* v. *Robert DeMario Jewelry*, 361 U. S. 288, 292 (1960).

II

UNLIKE THE *MIAMI* AND *AT&T* CASES, THE DUE PROCESS RIGHTS OF THE PETITIONER-UNION HAVE BEEN FULLY SATISFIED IN THIS *TWA* CASE

In the *Miami* case, the consent decree was modified on appeal only to the extent that the police officers' rights were affected. The remandment permitted the union to contest the proof of discrimination or the relief on promotions. There had been no evidentiary hearing on those matters in the district court. In this *TWA* case the objecting union was permitted to become an intervening party without any conditions (I J. A. 3a), and had participated fully in the hearings on the approval of the settlement. II J. A. 15-190.

In the *AT&T* case, by seeking to dismiss the action without compliance with the 1974 Clayton Act amendment, AT&T would have prevented the participation of "interested persons or agencies." § 5(a) of Clayton Act. The "competitive impact statement" which the Government is required to file under the section is similar in concept to the "unusual adverse impact" on current employees required to be decided in determining retroactive seniority under Title VII. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976).

In this *TWA* case, the district court permitted the petitioner-union to intervene without condition and raise any objections to the settlement or the plaintiffs' claim of retroactive seniority. The union was present at the hearings and introduced extensive testimony, resulting in a finding of no unusual adverse impact, which the union contested in Question 3 of its certiorari petition. This court's May 18, 1981 order removed that issue from review as improvidently granted. Nevertheless, despite its appearance the union has continued to contend under its Questions 1 and 2 that it was deprived of due process of law "without the opportunity to litigate the issue of liability." Union reply brief p. 8.

A clear answer to the union's contention is that it, unlike third persons in the *AT&T* and *Miami* cases, was permitted to litigate the issue of liability without restriction. Unlike the *Miami* and *AT&T* cases, a finding of liability had been made in the summary judgment that TWA's pregnancy practice had violated Title VII. The union as intervening party contended it was not bound by the summary judgment because it was not in the case when the summary judgment was entered. Due process is violated, the union contended, if it is bound by the summary judgment. But the union's intervening petition could have alleged that its collective bargaining agreement with TWA would be violated by an award of retroactive seniority because the summary judgment was wrong or because the plaintiffs had been terminated lawfully. The union did not make that allegation or attempt to prove it at the full evidentiary hearing. II J. A. 11, 26-83. The union did not take advantage of the opportunity of contesting the unlawfulness of the termination.

Due process, which is satisfied by the opportunity to appear and be heard, was not violated. *Davidson* v. *New Orleans*, 96 U. S. 97 (1877), the main due process case relied on by the union. See TWA brief p. 21.

However, more than due process is involved. The union has admitted that the summary judgment was right in finding a violation of Title VII. Its reply brief in this Court stated (p. 19) that the union "believes that TWA's preg tancy—mother policy was wrong." Thus while claiming deprivation of due process for its non-participation in the decision of violation of Title VII, it admits that the decision was right.

CONCLUSION

TWA urges the Court, without the complication of the kind of considerations involved in the *Miami* and *AT&T* cases, to adopt the first or second alternatives set forth in its chief brief (p. 6) and affirm the settlement agreement. The petitions in Nos. 78-1545 and 1549 may then be treated as moot, and the judgments in those cases in the district court and court of appeals may be dismissed. The settlement order may thus be affirmed regardless of the Court's decision on the seniority order.

Respectfully submitted,

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